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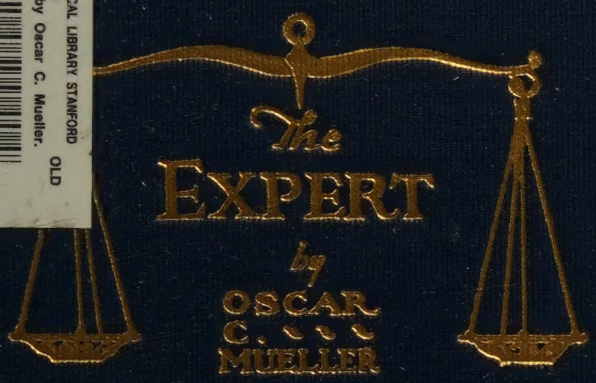

The EXPERT

by

OSCAR C. MUELLER

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"THE EXPERT"

BY

OSCAR C. MUELLER, 1876-

LOS ANGELES
SATURDAY NIGHT PUBLISHING COMPANY
1929

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PUBLISHED, AUGUST, 1929

PRINTED IN THE UNITED STATES OF AMER

M94
1929

DEDICATED TO EARNEST MEN OF THE LEGAL
AND MEDICAL PROFESSIONS WHO ARE
TRYING TO RAISE THE STANDARD OF
OPINION EVIDENCE AND CORRECT
ITS MANIFEST EVILS

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INTRODUCTION

THIS is not a law book. The writer practiced law in Los Angeles for nearly thirty years and, while President of the Los Angeles Bar Association, in 1917, gave considerable time to the subject of opinion evidence and suggested changes. He found many court battles amounting to discredited legal contests.

Widespread interest and discussion of this subject show that remedial measures are called for in nearly all the states. An endeavor has been made to write what follows free from technicalities and to have the general reader constantly in mind. To the generous suggestions of Dr. Andrew Stewart Lobingier and Hon. Frank F. Oster the author makes grateful acknowledgment.

While severe criticisms of present systems are made, let us hold with Tennyson that "there is truth in honest doubt," and we must expect widely divergent views of experts.

If the effort herein made to raise the standard of experts will do no more than stimulate other studies and inquiries, it will not have been made in vain.

When remedial measures have been presented to legislatures and have been defeated, it is largely due, as Dr. Alphonse Clearwater observes,

"because of the opposition of lawyers and physicians of secondary rank in both professions."

We have shyster lawyers and pseudo medical men opposing any change in the present proceedings, and we might well say to them "A plague o' both your houses."

An expert witness should always be qualified either by professional, scientific or technical training, or by practical experience in some field of human activity, conferring on him an especial knowledge not shared by men in general, and these are the types of men we are asking to cooperate with us in urging necessary changes.

There are alienists who take a deep interest in their profession and become greatly absorbed in the question of a man's mental condition. Dr. John L. Macumber, aged alienist and neurologist of New York City, died a short time ago of cerebral hemorrhage, caused, many believe, by worry over the conviction of Thomas Moran, whose cause he had championed. Dr. Macumber testified at Moran's two trials and contended that he was not responsible for his acts. He even pleaded with Governor Smith for clemency, but Moran went to the electric chair.

Testimony of one physician can have great effect, either for or against the accused. For instance, in the celebrated case of Dr. Crippen, the American dentist, tried in a London court, he was

convicted largely on the testimony of Dr. A. J. Pepper, consulting surgeon of St. Mary's Hospital, and the microscopic examination conducted by Dr. W. H. Wilcox. There was great interest evinced in this case, both in America and in England.

October 8, 1926, Ernest Yorkel was murdered in Cleveland, Ohio. Frank Milaggo was arrested. He was found in possession of a revolver and the bullets taken from the body of the deceased were sent to a noted expert in New York for examination. He decided that the bullets were from Milaggo's gun. The Cleveland News ascertained that the revolver was not sold until November 3, 1926, several weeks after the murder was committed. This statement of the newspaper was confirmed by the manufacturer and the retail dealer. This is an illustration of an expert making a terrible blunder.

Invariably, the hypothetical question brings a load of evils. Many brilliant attorneys, such as W. I. Gilbert, a leader of the California bar, are opposed to the hypothetical question. Mr. Gilbert characterizes it as "superfluous and useless, and, frequently, confusing to the jury." In a murder trial pending in New York six experts were examined; most of them had a national reputation, and were called upon to answer a hypothetical question consisting of fifteen thousand words.

In another case a hypothetical question contained twenty thousand words, and required two hours to read it. This lengthy question was propounded to Dr. Jelley, a Boston expert on insanity, in the famous Tuckerman Will contest. The answer of the learned doctor consists of three words: "I don't know." A frank reply, but rather perplexing to counsel. Dr. Frederick Farnell condemns these questions as constituting "a method highly artificial, unconvincing and complex."

In the following chapters the writer will review celebrated cases, quote from distinguished jurists and professional men, showing the need of new measures to replace the present archaic rules of procedure where experts testify.

OSCAR C. MUELLER

July, 1929.
Beverly Hills, Calif.

I

Origin of Opinion Evidence

"EXPERT" derives from the latin "expertus"—meaning skill. In a Virginia case, the expert is simply defined. It is the case of Bird vs. Commonwealth, 21 Grattan, Page 800. "The expert is a person of large experience in any particular department of art, business or science."

Appointment of experts is an old procedure. The power of selection existed under the Roman law. The judge could summon experts for the purpose of giving him information. The code of Emperor Charles V., in the middle of the sixteenth century, provided for medical experts. Henry IV., of France, personally appointed experts in 1600.

In Alsop case in the Court of King's Bench in 1609, "two doctors of physics testified as experts."

Experts were used in the trial of the Suffolk witches in 1665.

Those skilled in mercantile usage were called in Buller vs. Crips in an English case in 1703.

Oliavina, Princess of Cumberland, contested certain portions of the will of King George III. Expert testimony was introduced and forgery proved.

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II

The Alienist

DEFENSE of insanity is so often interposed by defendants charged with criminal acts that, for many decades, trial courts have been cautioning juries and a supreme court has upheld this charge of the trial judge to the jury: "The defense of insanity is one which may be, and, at times, is resorted to in cases where the proof of the overt act is so full and complete that any other means of avoiding conviction and establishing punishment seems hopeless. While, therefore, this is a defense to be weighed fully and justly, and when satisfactorily established must commend itself to the favorable consideration of the humanity and justice of the jury, they are to examine it with care lest an ingenious counterfeit of such a mental disorder should furnish immunity for guilt."

Showing the absurd extent to which some experts will go is the following suggestion of Dr. Siegfried Block, a New York neurologist and psychiatrist, who claims that "uncorrected love complexes" cause the majority of cases of insanity. The doctor in his sensational address says—"love and insanity are not very far apart. The symptoms of both are similar—suspicion—egotism—neglect of all interest—complete ab-

sorption in one thing—all these traits are common to love and insanity alike."

They who have served in the capacity of district attorneys have denounced this plea of insanity at the time of committing the crime, and called attention to the fact that juries and courts have been duped long enough.

Of course, some do come within this definition of insanity: "Insanity means such a diseased and deranged condition of the mental faculties as to render the person incapable of distinguishing between right and wrong in relation to the act with which he is charged. An irresistible impulse to commit an act which a party knows to be wrong and unlawful (if it ever existed) does not constitute the insanity which is a legal defense." The standard of accountability is this: "Had the party sufficient mental capacity to appreciate the character and quality of the act? Did he know and understand that it was a violation of the rights of another, and, in itself, wrong? If he had capacity thus to appreciate the character and comprehend the possible or probable consequences of this act, he is responsible to the law for the act thus committed, and is to be judged accordingly."

Insanity has been defined by some experts to be a disease of the brain which causes a departure from the normal in the functioning of the mental processes.

While the question of the accused's sanity has been pleaded in the cases where presidents of the United States have been assassinated, other rulers have met a similar fate, and we do not find that Caligula, or Paul I, or Philip of Macedon, or Julius Caesar, or William of Orange, or Henry IV., or Peter III were victims of assassins whose mental condition was under observation by experts.

One of the most unusual forms of insanity, which was refused admission as a defense in the Snyder-Gray murder trial in New York, actually saved a woman and her daughter from possible capital punishment in the State of Illinois. "Folie a deux" (literally, "folly of two") was a defense offered by a woman and her daughter who strangled their husband and father. Dr. Francis J. Gerty, superintendent of the Psychopathic Hospital, claimed that the malady was a "joint insanity." He contended that the mother was insane and that the daughter developed the identical complex. While the jury returned a verdict of murder while insane, the defendants were committed to an Illinois insane hospital.

Frequently the alienist is charged with claiming that numerous people have hallucinations. Many have claimed this regarding great writers and musicians. For instance, in the Blymyer case, Dr. Ridgway, of the Harrisburg State Hospital for the Insane, testified that Blymyer was

suffering from psycho-neurosis, which the expert described as the borderline between sanity and insanity, and when he was asked if, in his opinion, the defendant knew right from wrong, he said that "as a feeble-minded person he did, and that he did on the night of the commission of the crime." In this case, the jury ignored the plea of the defense that Blymyer was insane. His attorneys introduced testimony to the effect that the defendant was so mentally unsound he believed he was doing the right thing in killing Rehemyer. Judge Ray P. Sherwood had told the jurors if they found Blymyer not guilty by reason of insanity, it would be necessary to find that the defendant could not conceive the difference between right and wrong at the time of the crime. He had previously ruled that belief in witchcraft or similar "delusions" does not constitute legal insanity.

Dr. William J. Hickson, noted psychiatrist and director of the psychopathic laboratory of Chicago's Municipal Court, after examining 40,000 criminals, designated the typical "racketeer" as emotionally feeble-minded; that he is suffering from dementia praecox, and is just as insane as the hyperemotional type found in asylums. He maintains that such a person is constitutionally incapable of refraining from crime.

An unusual type of insanity was pleaded some time ago in the Vincent Rice case, which was

called the "Narcissus complex." It was claimed to be the newest scientific defense. When Rice came on for trial, however, the testimony of two alienists, one for the plaintiff and one for the defendant, caused the case to end abruptly. The alienists expressed their opinion that the boy's act was committed under the influence of an impulsive terror, and the plea was changed from "not guilty" of murder to an admission of second degree murder. It was a case of two experts representing opposite sides believing in the same condition of the boy. The testimony of the alienists showed that the defendant was medically insane but not legally so.

Both Freud and Jung, psychoanalysts, contend that many symptoms of insanity are similar to the actions of normal persons. Freud mentions many connecting links between normality and abnormality. In the investigation of the forms of insanity, in that which is called "dementia praecox" group, we find that they are disorders of adolescence. It is for that reason that we have so many young criminals. The late Dr. Max Schlepp comments upon the juvenile criminal and says—"feeble-mindedness, in which the seeds of a vast amount of criminality repose, is constantly on the increase." It is now estimated that 59 per cent of the country's criminals are youths of less than 21 years of age. In the chapter entitled "Celebrated Cases," there will be reviewed the testimony of noted alienists.

III

The Realtor

FREQUENTLY, the Realtor is called as an expert on realty values. Condemnation cases and those affecting appraisal of property for inheritance tax require the testimony of experts on real estate. A case that attracted wide attention was that of the opening of Broadway in Los Angeles, between Tenth and Eleventh, and between Twelfth and Pico. According to the witnesses for the property owners, the value of the property taken was $2,069,949.38, while those who testified for the City of Los Angeles gave an estimate of $896,863.62, or a difference of $1,13,085.76. The verdict of the jury was for $1,209,568.57.

In speaking about testimony of paid experts in this case, Judge Walter Bordwell termed their testimony as "mental acrobatism, dexterity and juggling." Continuing, Judge Bordwell said: "In the very nature of things, under such circumstances, openness of mind and delivery of testimony free from bias are out of the question." If the Los Angeles Realty Board had prepared a list of men who were particularly familiar with the values of what is called "downtown realty," and from this list, the judge had selected a few men, surely, their evidence would have been well

received by both court and jury. They would have been compensated by the court, had no client to serve and have given a fair opinion regarding the value of these important pieces of real property. The trial of this case could have been shortened many days and relieved the confusion of the jury.

One case involving considerable expert testimony was that of the investigation of the report of the inheritance tax appraisers in the estate of Ida Hancock Ross in the Superior Court of Los Angeles county.

Four or five witnesses testified that the value of the estate was seven and one-half to eight million dollars. These experts appeared for the state. Those called by the executors maintained that the value was about three million dollars—a slight difference of four and one-half million dollars. The award of the court was in the neighborhood of $3,300,000. The victory won by the Hancock estate was upheld by the Supreme Court of California. The case was heard by a fearless judge who would not put his stamp of approval on an attempt outrageously to tax an estate. He had the same courage shown by Justice Holmes, of the Supreme Court of the United States, when, June 4, 1928, he had occasion to denounce what he called "dirty business" of government agents tapping telephone-wires in order to obtain evidence to be used in criminal prosecutions.

IV

Crime in General: and Celebrated Cases

IN delivering an address before the Bronx Bar Association, Judge Charles E. Hughes called attention to many evils which we should correct in our legal system. He says: "Our procedure, especially criminal procedure, has too many archaic survivals. In several instances, what was once a guarantee of liberty is now a fetter of justice."

Chief Justice Taft, in a recent interview said: "It is a disgrace to our country that so many criminals with large resources at their command, have been able to avoid paying the penalty for their misdeeds."

Since entering the White House, President Hoover has said: "Life and property [in the United States] are relatively more unsafe than in any other civilized country in the world."

In a Memorial Day address by former President Coolidge, referring to this difference in Europe and America, he said: "Murder rarely goes unpunished in Britain or France. Here the reverse is true." These are, indeed, severe indictments by Chief Executives of the nation. In the forcible arraignment of American procedure, Mr. Coolidge desired to awaken the sense of responsibility of citizens, and concluded with the words,

"*We ought to be our own harshest critics.*"

General Pershing may be quoted as follows: "In proportion to population we have forty times as many murders, for instance, as our northern neighbors, twenty times as many as Germany, and ten times as many as England, mainly because we do not enforce the laws. In 1925 the murder rate reached the appalling number of one to every 9,000 population, or about one-eighth as many murders in one year as we lost in battle during the World War. An actual reign of terror breaks out at frequent intervals in some part of the country from which neither rural districts nor thickly populated centers seem able to escape. The trouble is that there is a careless and listless attitude among our whole people toward both law and government."

Lewis E. Lawes, in his book entitled, "Life and Death in Sing Sing," says: "The whole body of the criminal law needs revision, both in expression and principle." He finds the present criminal code "unscientific, illogical and impracticable." Lawes was a warden of Sing Sing, and had twenty-four years of experience, contacting with more than 30,000 convicted men. The question comes to whether or not there shall be a preservation of civilized society. The criminal is fighting against this at all times.

Victor Hugo, in "Notre Dame de Paris," tells of the sanctuaries of France in the middle ages

where criminals took refuge. We seem to have created them all over our beautiful land and made them most accessible.

A great deal of reform has been brought about by the Baumes Crime Commission in New York. The report of this commission calls attention to the fact that, in a recent year, in all England and Wales the total number of murders, manslaughters and homicides was 154. In New York City alone (for the same period) the total was 221. The report continues: 'The chances of being held up and robbed in New York City are 36 more than in London. The city of Chicago offers 100 more chances of being held up and robbed than London."

This commission's report also shows that our opulent Uncle Samuel spends thirteen billion dollars every year to "prevent," "detect" and "punish" crime. For obvious reasons, the writer places quotation marks around these verbs. The flood tides of crime continue and Lincoln's earnest plea for respect for the law seems to have been forgotten. Here it is. Let us read it often: "Let reverence for the laws be taught in the schools, in seminaries, in colleges. Let it be preached from the pulpit, proclaimed in the legislative halls and enforced in courts of justice. And, in short, let it become the political religion of the nation, and let the old and the young, the rich and the poor, the grave and the gay of all sexes and tongues

and colors and conditions sacrifice unceasingly upon its altar."

In a recent celebration of London's one hundredth anniversary of Sir Robert Peel's organization of the Metropolitan Police Force, directed from Scotland Yard, it was shown that, in one year, there were reported more than 333,083 crimes in New York, while in London it showed 15,662. In 1927 the London police solved every one of the twenty-seven murders! *In all the eighteen murders committed in London in* 1928, *the perpetrator was arrested. Eleven of the culprits were prosecuted and convicted. In the other seven cases the murderers committed suicide. Think of one hundred per cent success!*

It is said that, proportionately, there are one hundred times as many automobiles stolen in Cleveland as in London. There are about 1,000 automobiles stolen in the city of Chicago every month. In the entire Dominion of Canada, in 1924, 299 persons were charged with stealing motor cars and all but nineteen convicted. How humiliating are these contrasts!

New York, the great metropolis of America, has armored cars passing continually through its streets, *and this is not considered necessary in other civilized countries in the world except in times of war.* The New York State Crime Commission found that there were 19,468 arrests for felonies in New York in 1925 and only 1,178

were committed to Sing Sing. Since 1906 murders have quadrupled in the United States.

Judge Marcus Kavanagh has recently written a book entitled "The Criminal and His Allies." He had thirty years' experience with the worst criminals in Chicago, and concludes that the chief cause of the tremendous increase of crime in America is due to the petting of criminals by misguided sentimentalists. He does not believe the criminal mind is inherited.

Judge Kavanagh gives statistics. According to the record for 1925, there were more than 3,000 robberies committed in Chicago and less than ten per cent of the criminals perpetrating these offenses were sent to the penitentiary. Taking our data from the Chicago Tribune, November 1, 1927, we find the following: "In 1926 the Chicago police made 20,186 arrests for felonious crimes, punishable by penitentiary or reformatory sentences; yet, out of that number, only 647 persons were sent to the penitentiary or reformatory."

In comparing the record of the homicides in the city of Chicago for 1928, it was found that, up to December 20 of that year, the homicide bureau announced that 479 persons had been murdered in Chicago that year, but the United Press, in sending out the information, warned its readers by saying: "With eleven more shooting days until New Year." Chicago had a total

of 445 in 1927, making a potential increase of, approximately, 40 for 1928. Among the first degree murders, twelve policemen were killed, and the manslaughter cases numbered sixty-two on account of drunken brawls. The laws of the United States do not differ materially from England. It is in our enforcement where the radical difference appears.

Another feature that exists in America which is most reprehensible is the system of inveigling citizens to commit crime. It would seem as if our appalling criminal records would be sufficient and that they should not be augmented, but in every large city of America, enforcement officers of various departments set traps for the commission of crime, in order that it can be detected and an easy conviction procured!

William DeWitt Mitchell, attorney general of the United States, says: "Detection and punishment of crime must be effected by strictly lawful methods. Nothing has a greater tendency to beget lawlessness than lawless methods of law enforcement."

Rowland Molyneaux was convicted on the first trial and acquitted on the second trial after an appeal had been taken to the New York Court of Appeals. Dr. Allan McLane Hamilton, noted alienist, devoted two months in the celebrated Rowland Molyneaux case and was steadfast in

his belief in the insanity of the accused. This case required a greater length of time to try it than any other criminal case in the history of New York. Molyneaux was charged with sending poison through the United States mails. It is claimed that the total cost of the trial was $200,000. It was in the trial of this case that Dr. Hamilton became convinced that the court should appoint alienists to testify.

Testimony of the noted alienists in the notorious Thaw case amounted to a "bargain and sale" of evidence. Thaw was charged with killing Stanford White, the noted architect. The latter has been sometimes compared to Benito Cellini, as being very gifted but also very dissipated.

On account of the great wealth of the defendant's family, it was generally conceded that they employed the expert witnesses to argue the subject of the various forms of dementia. Thaw's mother was widely known for her philanthropy and general charitable activities. She did not learn of the slaying of Stanford White until told by her son-in-law, the Earl of Yarmouth, upon arrival at his estate in England. It is asserted that the trial cost the Thaw family in excess of $300,000. On behalf of the State of New York, experts were introduced for the purpose of showing that Thaw's actions were not caused by a diseased brain. Then the tables were turned and, to prevent Thaw being incarcerated in Mattea-

wan, physicians testified that he was of sound mind. In this case, the counsel for the prosecution had to take an unusual stand.

In 1906 the case was tried and is still the subject of discussion, particularly, on account of the flock of experts employed by him. There were three appeals taken to the higher courts after his confinement in the asylum.

In 1907, during the trial of the case, after calling the jury's attention to peculiar actions of Thaw, District Attorney Jerome is reported to have said: "If you gentlemen can see any manic depressive in that, if there is any circulatory insanity in that, if there is any brainstorm there, if there is anything that these bug specialists allege," (the Jerome manner of characterizing several eminent alienists), "you can see what I cannot see. There is no evidence of delusion in the slightest degree on his part."

In 1909, in a habeas corpus proceeding instituted by Thaw for the purpose of gaining his liberty, Jerome took the position that he was *insane* and called celebrated experts to substantiate that claim. During this proceeding before Judge Mills, of New York, seven weeks were devoted to alienists and others, who testified on the subject of Thaw's mental condition. He sought to be released on habeas corpus proceedings. Judge Mills remanded him to the Asylum

for the Criminally Insane and he was also denied his liberty by Judge Morschauser.

In 1913, after Thaw's escape from Matteawan, Jerome appeared before the grand jury of Dutchess County and asked that Thaw be indicted for the crime of conspiracy. He had to take the position that he was sane because an insane person cannot be charged with a criminal act. Thaw had two trials and, when he escaped to Canada, three Canadian courts were involved in the proceedings relating to his custory.

In 1914, Mr. Jerome stated in his brief in the Supreme Court of the United States: "This department" (Department of Justice of New York,), "regards Thaw as insane, a menace to society, and a fugitive from justice." So it will be seen that, with the aid of alienists, the State of New York had him twice sane and twice insane! What a travesty!

In this case there was a coined phrase, "Dementia Americana," by the late Delphine M. Delmas, counsel for defendant. This and his phrase "brainstorm" seemed to be confined to the Thaw case. In all foreign countries this case was looked upon as an unsavory exhibition of American jurisprudence. Criminologists realize that one of the most dangerous members of society is the paranoiac criminal, because their homicidal insanity may return.

In the celebrated case of Florence Maybrick,

in the Liverpool assizes in the summer of 1889, the toxicologists were the principal experts. The effects of arsenic and other noxious drugs were given more attention in this case than any previously in the history of the English courts. Dr. Stevenson was considered the leading British authority on poisons at that time and his testimony created a profound sensation in the courts of England.

Perhaps, the leading case involving expert testimony in California, was that of the Estate of Dolbeer, 149 Cal. 227. Prominent San Francisco lawyers were arrayed against one another. Miss Dolbeer left a very large estate and disappointed relatives instituted proceedings to contest her will. The contestants offered three physicians, none of whom had known Miss Dolbeer in her lifetime. They were asked long hypothetical questions, purporting to give the facts in the case, beginning with the alleged insanity of Miss Dolbeer's mother, then proceeding with various facts surrounding her life, her mental and emotional characteristics and finally her death by her own hand. Justice Henshaw, of the Supreme Court, said: "These three medical experts in answer to these long hypothetical questions replied that, upon the assumption of the truth of the facts stated, they were of the opinion that 'at the time of her death' Miss Dolbeer was of unsound mind and suffering from a form of insanity

known to medical science as 'simple melancholia.' The witnesses were skilled alienists, it may be conceded, but the evidence thus adduced of one who has never seen the person and who bases his opinion upon the facts given in a hypothetical question is evidence the weakest and most unsatisfactory.

"Such questions themselves are always framed with great particularity to meet the views of the side which presents the expert. They always eliminate from consideration the countervailing evidence which may be of a thousand-fold more strength than the evidence upon which the question is based. They are astutely drawn, and drawn for a purpose, and that purpose never is the presentation of all the evidence. It is never to present the fair and accurate view, but the purpose always is to frame a question such that the answer will announce a predetermined result. This kind of expert testimony of able and disinterested witnesses, as no doubt these were, is in the eye of the law of steadily decreasing value. *The remedy can only come when the state shall provide that the courts and not the litigants shall call a disinterested body of board of experts who shall review the whole situation and then give their opinion with their reasons therefor to the court and jury regardless of the consequences to either litigant. So and so only can it be hoped to remove the estimate of infirmity which at-*

taches at the present time to this kind of evidence."

In the Loeb and Leopold case, the defense, with the wealth of these criminals' parents, was able to secure distinguished alienists. For instance, Dr. William A. White, superintendent of the Government Hospital for the Insane in Washington; Dr. Healy, well known psychiatrist, author and director of the Baker Foundation of Boston; Dr. Glueck, alienist for different penal institutions in the state of New York. This case was characterized as "a battle of the experts." The opinions of noted psychiatrists were secured and one group controverted the conclusions of the other, all of which shows that a reform is imperatively demanded. While both Leopold and Loeb have been sentenced to life on a plea of guilty, nevertheless, it is freely predicted that, in the course of a few years, they will be liberated.

Judge Calverly, who presided in this case, referred to the tests of the psychiatrist, and, after his decision was given, drastic changes were demanded by the press on account of the general attitude of distrust by the public, but the matter was soon forgotten. The attorney for these two abnormal personalities was Clarence Darrow, the sensational Chicago criminal lawyer. On account of certain views of the Chicago lawyer, the Louisville Times says, with keen sarcasm, "Clarence

Darrow sees nothing wrong in taking the life of a defective child, unless, of course, it is a defective child charged with murder."

In the George R. Harsch case, recently tried, the accused man's wealth did not afford him the relief granted by Chicago courts. The jury was not convinced of the statement of the defense experts and brought in a verdict of guilty. Harsch is a scion of a wealthy Milwaukee family and belonged to the most exclusive clubs. The experts contended that he was a constitutional psychopath, incapable of distinguishing right from wrong. Ten alienists testified that the accused was the victim of insanity through habit and illness, and, possibly, hereditary ailments, while the state produced three physicians who testified that Harsch was, apparently, normal and unusually intelligent. Alienists for Harsch told the court that he could not resist the impulse to commit the crime of murder and robbery charged against him. They asserted that he did not realize the enormity of the crime in slaying Willard Smith, young drug clerk.

One of the most infamous cases that we have had is that of George Remus, who murdered his wife in Ohio. He is referred to as "Ohio's famous transitory maniac." His case caused a special report of the National Crime Commission. The jury acquitted him on his counsel's plea of "transitory insanity." He retained a large num-

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ber of prominent alienists. The Probate Court sent him to an insane institution. Thereafter, the court of appeals declared him sane. In the opinion of the National Crime Commission we find the following:

"It is our hope that the interest and indignation aroused at the results of this trial will lead to a general demand on the part of the public that our legal procedure in this matter be entirely altered, and the committee desires particularly to call attention to the long step that has already been taken in this direction by the states of Massachusetts and Colorado, with most promising results in constitutionality. Both states have adopted the same fundamental idea of removing the determination of the sanity of the accused from the jury and placing it in the hands of disinterested qualified experts in the study of mental diseases. If other states will follow the lead of Massachusetts and adopt its sensible system, we can go a long way toward mitigating the disgraceful situation confronting American justice today as typified by the Remus case."

Louisville Courier-Journal says: "The best way to proceed for the sake of justice is to let the state's experts decide. That would put an end to the practice of giving those who have the money to hire high-priced experts to declare them too sane to go to an asylum and not sane enough to be responsible for their misdeeds, an advantage

before the courts over defendants who can't afford the expense."

Remus himself took the stand, so that the judge and the three alienists who sat with him in an advisory capacity might decide the question of his sanity. In this case one of the three alienists who testified at the murder trial claimed that Remus was sane and then changed about and is reported to have said he was "ruthless, reckless, selfish; the kind of man who takes the law into his own hands; a man of irregular tendencies, with a leaning toward the criminal side." He was asked if he considered him a dangerous man, and replied: "I certainly do."

Remus was known as Cincinnati's bootleg king and was acquitted by the State Supreme Court by a four to three vote, the court affirming the decision of the court of appeals ordering Remus' release from the Lima State Hospital for the Criminally Insane, to which he had been committed after his acquittal on a first degree murder charge on the ground of insanity. The court held that he had a right to seek release from habeas corpus proceedings. Remus employed an amazing battery of alienists, who gave their testimony before the court. Dr. Shelley Manaulte, former physician at the Long View Hospital, at Cincinnati, occupied the entire day on the stand and stated that he believed Remus to be sane.

Dr. K. L. Weber, assistant physician at the

Lima State Asylum for the Criminally Insane, declared that Remus was insane. This was at the hearing when the defendant endeavored to secure his liberty after the trial of the case. Remus was acquitted on the charge of killing his wife on account of insanity, in December, 1927, *and in February*, 1928, *he was making the application for release upon the ground that he was then sane, being a parallel case to that of Thaw.* Dr. Weber took the witness stand and declared the rum baron insane by his provisional examination. When asked to give some of the eccentricities of Remus which led him to his provisional verdict of insanity, the physician cited Remus' fastidious cleanliness, his preference for silk next to his skin, his dislike of underwear and steam-cooked foods!

Three most disgraceful cases in America of recent years have been the Thaw, Remus and Hickman cases. To the credit of the state of California Hickman was tried, convicted and executed after every possible legal intervention was taken, even to application to the Supreme Court of the United States. While, in the other two cases, both defendants, although guilty of taking the life of a human being, are free at the present time.

When Hickman was first arrested he was examined by experts—one of whom was Dr. W. D. McNary, superintendent of the Eastern Oregon Asylum for the Insane. He found that there

was nothing in this criminal to indicate insanity; that his mind was clear and that he told a coherent story and did not differ from hundreds and thousands of other young men. From a general examination of doctors it was found that he had no outward evidences of perversion. The various tests were made—neurotic, psychological and pathological. During this time the defendant was laying the foundation for the insanity plea thereafter to be introduced by his counsel. Hickman even referred to the success of Remus in pleading insanity. At the inception of the arrest of the accused in Pendleton, Oregon, Dr. C. C. Waincott, the state physician, examined him and found him to be normal and expressed an opinion that he was shamming.

One of the specialists in mental diseases who testified in this case was called before a committee of the medical society of the city, in which he practices, to answer questions regarding asserted inethical practice in appearing as a witness in the case. The final result of the hearing of this widely-known psychiatrist, who was before the County Medical Society, was a suspension because of his testimony in the Hickman affair. During the "battle of the experts" in the trial of the case, the first medical witness claimed that the accused was suffering from ciros-meningitis; another one stated that his particular trouble was dementia-praecox; still another said that his

malady was megalomania. One of the questions asked an alienist in the trial of this case was as follows: "Is it not a fact that dermatographia is found present in dementia-praecox? With the exception of the experts, no one else in the entire courtroom understood the question. It is doubtful, when explained to the average juryman, that dementia-praecox means an overdevelopment of the intellect and underdevelopment of the emotions, that he would be able to grasp the technical phraseology of the expert, especially when the distinguished experts must refer to them as "hyper-emotionalized individuals."

Examination of the accused was made by a noted psychiatrist and a report given to the district attorney. How much better it would have been if the examination had been made at the suggestions of the court, and the report made directly to the court. The viewpoint of the layman is well set forth by Mr. Harry Carr, the scintillant writer for the Los Angeles Times: "Now that Hickman has accumulated a lawyer, the old story begins again . . . requests for postponement . . . experts on insanity . . . sob sisters . . . sentimental letter writers and flower senders. The appalling breakdown of our system of criminal law enforcement is as dangerous one way as another. Knowing the piffling technicalities they have to face, it becomes an almost in-

tolerable temptation for policemen artificially to strengthen their cases."

It was estimated that the Hickman case cost the county of Los Angeles nearly $100,000 before this criminal was finally executed. Dr. Joseph Catton, internationally known neuro-psychiatrist, studied this case for the Rockefeller Foundation.

In the Gordon Stewart Northcott case, tried in Riverside, California, science was represented one day by paleontologists and biochemists. Their opinion was that Northcott fully realized the difference between right and wrong and is wholly responsible for all of his conduct. The experts came to the conclusion "that this individual is malingering or feigning a form of insanity, in order to prove himself incompetent and irresponsible."

Experts were appointed upon the application of defendant's counsel, and a report rendered. It was signed by Dr. G. M. Webster, president of the State Insane Asylum at Patton, and based upon their observations of the defendant in the courtroom and upon two examinations made in the jail. Their report was "That Northcott was assuming an attitude of disinterestedness, and that this attitude is assumed by him with the idea of producing an impression that he is not responsible for the crimes of which he is accused.

After the report of court experts the defendant abandoned all idea of pleading insanity.

V

Miscellaneous Experts

POPE once said: "One science alone will one genius fit, so wide is art, so narrow human wit." The status of an expert should be of dignity and respect. The difficulty is that most experts think in scientific terms and they express themselves in language which is often unintelligible to the jurymen. The Scientific American called attention to one case where the testimony of a prominent expert occupied eighty pages of the record to prove that an electric dynamic machine could be used either as a dynamo or as a motor, a point which had already been conceded by the other side.

If, in engineering cases, one could have the advantage of the unbiased opinion of eminent men of the profession who have finished tasks of great proportions, it would add to the dignity of expert testimony. The well-known Risley case mentioned by Mitchell on "Expert Witnesses," was tried in 1911 in the Supreme Court of New York. There, an expert mechanic endeavored to take a typewriting machine and make the same faults of spacing and aligning and defective lettering. It was found that this was an absolute impossibility.

Handwriting experts have been quite promi-

nent in the trial of will contests and forgery cases. The most distinguished expert is Daniel T. Ames. Among some of the celebrated cases in which Mr. Ames appeared was the will contest of James G. Fair, wherein an estate of $20,000,000 was involved. A pencilled will was under investigation by Mr. Ames. In this and other cases, he used large photographs to explain to the court and jury.

Mr. Ames also made an examination of certain documents in the celebrated Captain Dreyfus case. He gave it as his opinion that the Bordereau was not written by Dreyfus. In these celebrated cases Mr. Ames' judgment was nearly always upheld.

In the case of Hanson vs. Waldo, decided in 1914, 163 New York Appellate Sub-Division 665, the court said: "The doctrine is well founded that the court should exercise great liberality in the cross-examination of a handwriting expert in order to test the skill, schooling and training, also the experience and competency of the expert, and to determine the weight to be given his testimony, so that the jury may be enabled properly to accord the credibility and weight of his testimony."

In recent years, art experts have been summoned into court to testify in cases involving fraudulent sales and libelous statements. A celebrated case of libel was one brought by Whistler

against Ruskin in England in 1877, on account of Ruskin's criticism of Whistler's pictures in the Grosvenor Gallery.

In 1917 an American collector paid $100,000 for what he thought to be a Romney. He afterward claimed that it was painted by Ozias Humphrey. The court had many experts testify. There was discovered on an original sketch of this picture the initials "O. H.," thus establishing the fraud claimed. The chemist and microscopist have really had less scandal attached to their testimony than any other. The laws of chemistry seem to be so certain that they cannot be misapplied. Then, it is not a difficult thing to isolate a poison. In the criminal investigation bureaux of France, laboratories are presided over by eminent experts in chemistry.

It is interesting to note how modern scientific methods are solving crime. H. Ashton-Wolfe, assistant investigator under Dr. Georges Beroud, director of the Marseilles Scientific Police Laboratories, recently had an entertaining article in the Illustrated London News, upon the subject of experts aiding in the detection of crime, and called attention to investigation with microscopes, cameras and chemical reactions. Then he gave the danger of a grievous mistake. He recalled that Bertillon had always refused to commit himself where "writing was concerned," but at the trial of the Dreyfus case, had declared that the

famous Bordereau had been written by Dreyfus." It will be recalled that it was brought out during the case that the author was Esterhazy.

Another interesting subject is that of the finger-prints expert. It seems to be fully demonstrated now that finger-prints will continue to be reliable means of identification. X-ray will play a tremendous part in the identification of criminals. Several experts even go to the extent of predicting that it will supersede fingerprints. The noted authority, Professor G. L. Clark, of the University of Illinois, claims that radiographs are more individualistic than fingerprints.

Thomas W. Lamont, partner in the J. P. Morgan Company, as one of the executors of Edward Mills, nephew of D. Mills, pioneer California banker, claims that art dealers had victimized Mills to the extent of hundreds of thousands of dollars. We assume this case will call for expert testimony, with all of its conflicting theories.

There have been a great many interesting trials decided where the expert is called in cases where there have been sales of objects of art. Recently, there was discovered an humble sculptor in Rome, Alceo Dossena, whose creations have been sold to American museums as genuine works of old masters. It is said that Dossena confessed that he was the author of various pieces of sculpture in the Boston Museum and in the Frick collec-

tion in New York City. Prince Valerio Pignotelli, of Rome, says "Dossena confessed that, in addition, he made a marble statue, in the archaic Greek style, which he described as 'one meter high, with head and legs broken.' " This, too, had gone into an American collection, he believed.

Another alleged deception in an art case is that contained in a message from Paris challenging the authenticity of a bathtub owned by John T. Ringling, in which Marat, the famous French revolutionist, was supposed to have been bathing, when stabbed to death by Charlotte Corday. Ringling purchased the tub at a sale of property owned by the late Rodman Wanamaker. The Paris experts contend that the genuine tub is now in Paris. Both tubs were made of hammered brass and shaped in the fashion of a shoe.

In causing the failure of fraudulent sale, the Cleveland Museum had experts use X-ray examinations on a wood sculpture. A seventeenth century Italian work of art was cleverly metamorphosed with bits of old wood. The X-ray expert showed this and the museum does not have a spurious piece of sculpture to display to its visitors.

One of the most interesting cases involving expert testimony was that brought by Mrs. Andree Lardoux Hahn against Sir Joseph Duveen, international art connoisseur. The case was tried in February, 1929, before Justice William Har-

mon Black in the Supreme Court of New York. Mrs. Hahn brought suit against Sir Joseph for $500,000 for saying her portrait, "La Belle Ferroniere" is a copy of the original of that work in the Louvre, and was not painted by the celebrated Leonardo da Vinci. Sir Joseph appeared as an expert in his own behalf and he was examined at great length regarding art critics, famous masterpieces, and art galleries in general. He passed five days on the stand.

Mrs. Hahn contended that her picture was presented to an ancestor in Napoleon's army and was painted by Leonardo da Vinci. Sir Joseph testified that there were only eight authenticated canvases by Leonardo da Vinci in the world and that none of them was privately owned; that a newly-discovered canvas by the famous Italian painter would be worth between three and four million dollars. He also averred that in 1914 he offered $1,500,000 for a da Vinci picture called "The Benoit Madonna," and this was finally bought by the Tsar of Russia for his government. In the course of his examination he stated that he had been an art expert for thirty-five years and had sold works of Sir Joshua Reynolds at prices as high as $600,000, and for one Gainsborough picture he received $800,000. He testified that the last privately-owned da Vinci was by Francois I of France. Sir Joseph contended, furthermore, that da Vinci painted the em-

broidery on the dress in the style in his day, while the copyist had reflected the style of his own day.

Sir Joseph maintained that the canvas in question was not painted until after Leonardo da Vinci was dead. The painting was X-rayed by an expert before a lighted screen in an effort to help the jury decide whether "A Lady of High Degree" was the work of Leonardo da Vinci, or merely an ordinary copy.

An amusing incident occurred when Mr. Lawrence Miller, counsel for Mrs. Hahn, took up a volume and asked Sir Joseph if he had ever read the works of "Prevada Vita." The distinguished Britisher caused considerable merriment in the courtroom when he explained that "Prevada Vita" was Italian for "Private Life," and was the title of the book and not the name of the author. Sir Joseph Duveen is, unquestionably, the world's greatest authority on old masters.

George Sortais, art expert of the Department of the Seine, in France, pronounced Mrs. Hahn's painting the original masterpiece by da Vinci, and declared that the famous painting of that name in the Louvre Gallery in Paris is a copy. He based his contention on an old article by Lepicie, Royal Cataloguer to the king of France, who wrote a description of the picture in Versailles in 1752, stating that "La Belle" held a piece of lace in her hand. He claims this does not appear in the Louvre painting, and, therefore, he believes

that the Hahn painting is the original. Sortais qualified as an expert by stating he had examined 100,000 paintings in forty-five years. Mr. Sortais' contention was supported by Vadin Chernoff, Russian painter. The point developed by the Russian was that the Hahn portrait had been damaged and clumsily retouched and that the one in the Louvre was copied from the Hahn portrait, including all of the bad retouching. Chernoff contended that the Hahn portrait was more exquisite and, obviously, more of the period of da Vinci.

Sir Joseph called as one of his witnesses Captain R. Langton Douglas, British art expert, and he contradicted the testimony of Chernoff. He qualified as a specialist on Florentine, Siennese and Milanese paintings of the years 1250 to 1550.

Judge Black, in his charge to the jury, pointed out that it was essential for the jury to determine whether the Hahn painting is a genuine and that the burden of proving this rested on the plaintiff. He also instructed the jury that if Sir Joseph's statement was not true the jury must believe it was made with malicious intent.

March 2, after four weeks' trial, the case was submitted to the jury and after debating the question for nearly fifteen hours the jury disagreed and was released.

VI

Amusing Incidents With Experts

IN a recent number of Judge, appeared the following:

Defense Lawyer: "We propose to show that this brave, little woman murdered her husband in a fit of insanity, due to the fact that they had a crazy quilt on the bed."

In a recent murder case an expert testified: "Neurosis is a form of psychosis." Now, how would any jury understand what a doctor was saying when he made use of these scientific terms?

One of the common faults of experts is the desire to use many technical words, and thus confuse court and jury. The distinguished Dr. George W. Jacoby, considering the psychoses and the neuroses from the physiological viewpoint, says that "purely psychical injuries, unaccompanied by bodily manifestations of disease, are of etiological moment only in the most exceptional instances." Suppose a jury heard that!

In a case mentioned by Gilbert Stewart in his work on "Legal Medicine," a surgeon was called to testify in a trial for assault. He stated that he found the injured man "suffering from a severe contusion of the integument under the left orbit, with great extravasation of blood and ecchymosis in the surrounding cellular tissues,

which were in a state of tumidity." Now, of course, after a jury has listened to such a description, it would seem that the patient was about to die, or that his condition was exceedingly dangereous, while, as a matter of fact, the eminent follower of Hippocrates was describing a common ailment which, in the vernacular, we call "a black eye."

Mr. Francis Wellman, an able and prominent New York lawyer, tells a rather amusing experience which occurred in the examination of Dr. Joseph Collins, a well-known nerve specialist. The case involved a damage suit against the Metropolitan Street Railway Company of New York. The attorney made nothing out of his cross-examination of Dr. Collins and threw his parting boomerang at the witness:

Counsel: "After all, doctor, isn't it a fact that nobody in your profession regards you as a surgeon?"

Doctor: "I never regarded myself as one."

Counsel: "You are a neurologist, aren't you?"

Doctor: "I am, sir."

Counsel: "A neurologist, pure and simple?"

Doctor: "Well, I am moderately pure and altogether simple."

Dr. Hamilton, in his book "Recollections of an Alienist," tells of a witness who was undergoing cross-examination, testing her ability as

an expert to estimate the period of time, such as the passing of five minutes. The attorney said: "Do you mean to say that you could tell the jury the exact time?" The disciple of Blackstone took out his watch. I will let Dr. Hamilton complete the story: "He kept this attitude until a voice with a rich brogue said: 'Faith, the toime is up,' and *it was exactly*. Wheeling about in surprise, the lawyer demanded to know 'by what process of ratiocination' the conclusion had been reached. 'Rattycination, d'ye call it, faith, how could Oi help it with the clock forninst me?' During counsel's pleasantries, she had looked across the court room and quietly watched the long hand as it pursued its way to the end of the five minutes."

Dr. Hamilton tells of an amusing incident relating to the examination of an "expert" who was making quite an impression upon the jury until it came to cross-examination. It is as follows:

Mr. K.: "Dr. Blank, I see you are familiar with the literature of this interesting subject?"

Dr. B.: "Well, I should *hope* so!"

Mr. W.: "Have you read Smith on the Recent and Remote Effects of Head Injuries?" (One of the bogus books.)

Dr B.: "*That* book I read when a medical student."

Mr. W.: (with a grave face), went through the list. Strange to say, the doctor had read every non-existent book except one. Dr. Hamilton subsequently testified to his part in the preparation of the cross-examination, and there was a roar of laughter as the discomfited "expert" left the court room with his armful of "authorities."

An attorney asked a doctor: "The muscle of the patient's left leg had contracted till it was much shorter than the right. Therefore, he limps. Now, what would you do in such circumstances, doctor?"

Doctor: "I'd limp, too."

Another amusing incident concerning experts is that of an inmate of a certain asylum for the insane in the northern part of a western state, escaping therefrom and coming to a similar institution in the southern part of the state. At the latter place he represented himself to be a pathologist expert engaged in research work and was received, not only as such expert, but was also feted by the medical staff, and, finally, succeeded in cashing a bogus check for a substantial sum on one of the state banks. The latter resulted in his undoing and he is now at large; but the joke is referred to by a reporter with a sense of humor, when he said: "The psychologically shrewd medical luminaries of the state hospital for the

insane were fooled by a demented interne," and concluded his statement, "Yes, it is hard to tell who's crazy and who isn't."

Absurdity of pleading, so frequently the defense of insanity, is shown in a comedy called "This Thing Called Love." There is in one of the scenes a sudden parting of the hall curtains. A character, De Wit, stands wobbling on the threshold. He grasps a revolver and aims at one of the other characters and says, as he brandishes it: "I have engaged my alienist. Darrow will conduct the defense."

In the famous Leutgert murder case, the bones of the victim were discovered in a vat. This case was decided in Chicago in 1896. The question there was the identification of sesamoid bones. There was the usual wrangle of experts which disgraced both professions. Some of the most widely known osteologists of the age strenuously insisted that the bones in question did not belong to a human being, but to a hog!

One does not often think of an organization as being subject to insanity. A San Francisco magazine refers to a certain union as exhibiting "all the symptoms of self-importance, megalomania, intolerance, distortion of vision, irritability, inconsistency, etc., that are characteristic of incipient paranoa."

VII

Compensation of Experts

MANY attempts have been made to regulate the compensation of experts, particularly, in Iowa, Maine, Massachusetts and Minnesota. In the latter state there is an allowance made to hydraulic engineers of a certain sum per diem.

In 1911 an act was introduced in the senate and assembly of New York for the purpose of regulating the introduction of medical expert testimony. The act failed because it was claimed that it attempted to create a "doctors' trust." Mr. Clemens Herschel, former president of the American Society of Civil Engineers, stated that if all experts had been included in the bill, such an objection could not have been raised, and the bill might have passed.

Upon the subject of compensation of expert witnesses, Judge Foster, a well-known law writer, says: "He is not a witness in the ordinary sense unless called merely to testify to some fact which he has observed, for then he is not an expert. His position and office is that of a sworn interpreter of science to the court."

Some courts have held that an expert witness may refuse to answer questions if he is not compensated as an expert. This is especially true

where an expert witness is expected to give testimony of a nature which requires special preparation, investigation, research or examination of any kind by him in order to prepare himself to testify.

Matter of a contingent fee for an expert has been denounced by many committees on legal ethics. The subject was brought before the attention of the Los Angeles Bar Association, where the question concerned a handwriting expert receiving a fee contingent upon a judgment in favor of the party in whose behalf he testified. The Committee on Local Ethics said:

"In our opinion, such conduct is most improper. No witness, duly subpeonaed, is entitled as matter of right to any compensation for testifying to facts within his knowledge. Such compensation must be authorized by statute. A statute authorizing such compensation is the basis of all the rights of the witness in relation thereto . . . the query at bar bears directly upon the method of determining such extra compensation. The policy of this state respecting this subject is expressed in Code of Civil Procedure, sec. 1871, which authorizes the court to appoint one or more experts to *investigate* and testify. The court is also authorized to fix such expert's compensation for the investigation made by him. It has been decided by many courts that agreements fixing compensation of witnesses in a manner different

or in an amount greater than that authorized by law, are void. There is also most respectable authority that an agreement to pay a witness a bonus or other extra compensation contingent on success, is illegal and void."

"It is the opinion of the committee that expert witnesses appointed by the court pursuant to Code of Civil Procedure, Section 1871, may be paid extra compensation for special investigations made and work done in order to ascertain facts upon which to base an opinion; that such compensation can be legally determined only by the court and that any agreement to pay an expert extra compensation based upon a judgment in favor of the party in whose behalf he testifies, is illegal and void."

Compensation to be paid by the state to experts has been upheld in the case of State vs. Cole, 33 Louisiana, United States Reports, page 1356; U. S. Rock Creek Park Commissioners vs. C. Cook, 21 Washington (D. C.), Law Reports 182, and in Sell Faulkner vs. Hendy, 79 Cal. 263.

In the city of Chicago there were appointed experts for estimating local improvements. The matter was of such notable scandal that it was finally brought before the Circuit Court and, according to a decision of Judge Friend, certain experts held accountable for illegal fees in 1920 and 1921, the court deciding that they should make

restitution of $1,732,279, less $138,912, remitted by the two other defendants who were discharged. The suit was instituted by the Chicago Tribune, seeking as a taxpayer to recover money which it charged was diverted into a political fund at a time when an important campaign required financing. These men were employed by the municipality as experts for the appraisal of real property. Now, if a *court* had appointed honest experts, a scandal of this kind would have been impossible.

Dr. Hammond, of New York, received a large witness fee from the state in one case. His preparation for the trial occupied a considerable length of time. His attendance in court involved many days and his testimony was of the most important nature. This fee was attacked by the defendant in the Supreme Court upon the ground that the physician was prejudiced and in favor of the state by reason of its size, but the Supreme Court did not agree with this contention.

Upon the subject of fees, what seems to be to the layman very high fees to be paid to an alienist are not, in fact, extortionate. The layman does not take into consideration the days passed by the alienist in the preparation of the case. He may be weeks engaged in investigation and research work, and his actual testimony in court require but a very short period of time.

VIII

Expression of Authorities on the Need of Changes in the Law and Measures Proposed in Different States

IN a paper read before the Juridical Society in London, in 1859, by James F. Stephens, he observed: "Few spectacles, it might be said, can be more absurd and incongruous than that of a jury composed of twelve persons who, without any previous scientific knowledge or training, are suddenly called upon to adjudicate in controversies in which the most eminent scientific men flatly contradict each other's assertions."

Mr. Justice Bartlett said: "Let us remedy the evils, but, while we are endeavoring to do so, let us avoid that exaggerated denunciation which is calculated to convince the community that no surgeon or physician who takes the stand as an expert is worthy of belief." He refers to some criticism as "libel on the most useful profession in the world." He had considerable experience with alienists in homicide cases and also with pseudo-experts.

Judge Marcus Kavanagh, of the Superior Court of Cook County, Illinois, after a long career on the bench, approves the appointment of experts by the court. In one case where there was such a conflict of medical testimony, he asked the

Chicago Medical Association to name a commission of three to report upon the question of the sanity of the defendant. While Illinois has no statute upon this subject, defense counsel agreed to the procedure suggested by Judge Kavanagh. The judge, referring to certain types of experts, calls them a "highly trained body of medical mercenaries who want to advocate the cause that employs them."

In the case against Edward Kaltenbaugh, 21-year-old farm hand, who recently confessed to the murder of John Oser and his wife, at Canton, Ohio, the court appointed three experts and they held that he was irresponsible for his act. It was unnecessary for the defense to employ any. This saved a long wrangle and disgraceful procedure in the court.

In deciding the case of Coulson vs. Disborough, the distinguished Lord Esher, Master of the Rolls in England, said: "If there be a person whom neither party to an action chooses to call as a witness, and the judge thinks that that person is able to elucidate the truth, the judge, in my opinion, is himself entitled to call him; and I cannot agree that such a course has never been taken by a judge before."

Appointment of experts by the government in France has been most successful. On of the recent cases was that of the three government alienists who examined Lewis Klotz, former sena-

tor, who was charged with a felony. He was very prominent and the charge against him attracted a great deal of attention. The alienists reported that he was not suffering any bodily malady and was in full possession of his faculties.

In France, there is a classification of the experts to be appointed by the court, and, at the present time, there are forty-nine categories of these. There is a limitation of three experts when a question of handwriting is involved. The court appoints experts and this is regulated by the Code de Procedure Civile, Part I, Section 200.

In England the evils of expert testimony have been the subject of a great deal of discussion. For instance, we quote the decision of Sir George Jessel, Master of the Rolls, in Thorne vs. Worthing Skating Rink Co., L. R. 6, CH. Div. Note 415. The distinguished jurist is quoted as saying: "Now, in the present instance, I have the evidence of experts on the one side, and on the other, and, as usual, the experts do not agree in their opinion. There is no reason why they should. As I have often explained, since I have had the honor of a seat on this bench, the opinion of an expert may be honestly obtained, and it may be quite different from the opinion of another expert, also honestly obtained. *But the mode in which evidence is obtained is such as not to give the fair result of scientific opinion to the court.* A man may go, and does, sometimes,

to half a dozen experts. He takes their honest opinion: he finds three in his favor and three against him; he says to the three in his favor: 'Will you be kind enough to give evidence?' He pays the ones against him their fees and leaves them alone; the other side does the same. It may not be three out of six, it may be three out of fifty. . . . I am sorry to say the result is that the court does not get the assistance from the experts which, if they were unbiased and fairly chosen, it would have a right to expect."

At the present time the courts of France, Holland, Belgium, Austria, Germany and Spain appoint experts. The Italian court selects a commission of experts for the purpose of giving testimony.

Dr. Pierce Bailey well says: "If more trials ceased to be a game between experts and attorneys, with violent death the stake, public interest in them would surely dwindle."

Speaking of the conflict of testimony in these cases, Dr. A. F. Wagner, Los Angeles county autopsy surgeon, says:

"For example, when one group of experts state that dermatographia indicates insanity, and other experts declare that it has nothing to do with the question of sanity, to ask jurors to decide which side to believe is to ask them to do the impossible. They have no knowledge that dermatographia, for instance, has no more to do with legal

insanity than has a dose of hives. Again, in a recent trial, the prosecution claimed death was due to subdural hemorrhage, and the defense claimed the deceased died from alcoholism, pneumonia and nephritis. After several weeks of labor, a mountain of conflicting expert testimony was brought forth. One expert testified that pneumonia often resulted in subdural hemorrhage. Had he made such a statement in a medical society, he would have been laughed to scorn. What will jurors do in such and all similar cases? They will do the only thing they can do, disregard all the expert testimony. But the cause of death in this case was an essential point in the trial. How did that jury arrive at a verdict? The Lord only knows. Evidently, the witnesses on one side must have appeared to them to be more truthful, or, at least, less likely to be liars, than the witnesses of the other side. They ventured a guess, but guesses are just as liable to be wrong as right."

Dr. Wagner suggests that the State Board of Medical Examiners furnish an accredited list of experts. Then he speaks of the expert who is called by one of the parties who is scrupulously honest and sincere, but feels that many of the questions asked are unfair. As to this the doctor says: "Unlike the court-appointed independent, non-partisan expert, he is not given all the facts." He continues: "Let experts be ap-

pointed by the court, let them make their examinations and investigations before the trial, and they will agree as they do in the great majority of consultations in cases of illness, and when they disagree in a few instances, it will, at least, be an honest disagreement. . . ."

In Dr. Allan McLane Hamilton's book heretofore referred to, we find a keen analysis of the subject of expert testimony. Dr. Hamilton is a grandson of Alexander Hamilton. His chapters on "expert evidence" show a great breadth of vision. He uses all the strength of his genius to change unfortunate conditions. He tells of his busy professional life, full of dramatic episodes and gives many noted cases.

In Dr. Hamilton's long experience he was connected with more than one hundred murder cases where insanity was the issue, sometimes as a witness, and then acting as an adviser to counsel. He says: "After all these years I can regret the insufficiency of our laws." On page 278 of his book, Dr. Hamilton says: "The execration of expert testimony by the courts, press and public, is an instance of visiting the sins of the many upon the few . . . thus reversing the ordinary run of this well-worn saying. Of necessity, there can only be a comparatively few real experts in any branch, but the temptation to mercenary or ill-fitted men to thrust themselves forward, when occasion offers, and take the witness

chair, is often encouraged by unscrupulous members of the sister profession who wish to "hire" an expert to swear through their case. These medical solons are often successful because of their very self-esteem, and recklessness in giving an opinion, and by the display of a manner which is supposed to be strikingly professional." And again, on page 279: "With a certain part of the bar the idea that an expert can always answer a hypothetical question with the sacrifice of his common-sense, education and self-respect is the ordinary one. Sometimes, the interrogator, who propounds what a New York alderman once called a "hypnotic question," is supported by the judge, and the unfortunate doctor is chided for his stupidity. The more sensible lawyers, while they are obliged by the rules of their profession to use this way of eliciting opinions, regard the hypothetical question as unsatisfactory and disingenuous."

Extracts from the distinguished author's letter to the writer are set forth on page 68 of this book.

Lord Chancellor Campbell, in an English case called Tracy Peerage Case, 10 Cl. and F. 154, said in a very pessimistic way: "Hardly any weight should be given to their evidence."

Taylor, in his work on the Law of Evidence, says: "Expert witnesses become so warped in their judgment by regarding the subject from

one point of view that, even when conscientiously disposed, they are incapable of expressing a candid opinion."

At a general meeting of the Los Angeles County Medical Association and the Los Angeles Bar Association, held in Los Angeles, November 22, 1928, medical-legal subjects were discussed. W. I. Gilbert, spoke upon the subject of "Medical Testimony from the Standpoint of the Trial Lawyer." He made a strong plea for the appointment of the expert by the court.

Sir Gilbert Calvin, having large experience in the trial of contested will cases said: "In all cases where expert testimony is required, the expert should be employed and paid by the court and be regarded as a court officer."

Messrs. Wharton and Stillés, the distinguished authors of the work on "Medical Jurisprudence," favor the appointment of an expert by the court, claiming that he would have no client to serve and no one to vindicate; that he would render his opinion as an advocate neither of another nor of himself."

Hon. Orrin W. Carter, of the Illinois Supreme Court, calls for the enactment of a statute in every state to alter this procedure. After presiding for twelve years as a judge in the trial of celebrated cases and listening to the testimony of experts, he says that he sometimes thinks the great Frenchman, Talleyrand, was right when

he said that: "Language was meant to conceal rather than to express thought."

Dr. Carey P. McCord, in an illuminating article in the Forum, calls attention to the advantage of the court appointing experts and makes a particular point that all the facts obtainable would then be brought out. He says: "Without being hampered he (the expert) may recite to the court all the pertinent facts in the technical situation. Following this unhampered recital, the witness may be questioned by the court itself and cross-examined by either party."

There has been no more prominent expert in America than Daniel T. Ames. Mr. Ames, many years ago, had before him a list of 1,800 cases in which he was called to make an investigation. He had actually at that time testified in court in 1,200 contested cases. Mr. Ames favors an expert appointed by the court, after an experience covering more than thirty years.

One lawyer who has given much attention to this subject is Edward R. Keedy, chairman of the Committee on Insanity, appointed by the American Institute of Criminal Law and Criminology. This committee prepared a bill to regulate expert testimony. It passed the house in the state of Pennsylvania by a unanimous vote, but did not come to a vote in the senate. It will again be presented.

John H. Wigmore, the distinguished law writer, in commenting on Section 1 of the law prepared by Mr. Keedy, which empowers the judge to summon expert witnesses, selected by himself or by agreement of the litigants, in addition to those summoned by them, says: "At last it would seem that the lamentable conditions of expert testimony, under the present law and practice, have some prospect of improvement . . . this is the first needed step to eliminating the extreme evil of hired partisanship, but it wisely does so by trusting to the greater moral weight of a judge-selected expert, instead of attempting to create an exclusive and permanent body of official experts."

Hon. G. A. English, a noted Pennsylvania jurist, in an address before the Law Academy of Philadelphia, suggested the following:

First.—Formation of a stricter definition of expert capacity.

Second.—Reasonable limitation of the number of experts to be called in any case.

Third.—Payment of expert witnesses out of the public treasury, at least, in the first instance.

By making experts the appointees of the court, and their compensation not only sure, but independent of the effect of their testimony, a prominent cause of bias would be eliminated.

In a city like New York the surrogate frequently has before him will contests in which very large amounts are involved. Of course, the most skillful handwriting experts are employed for the purpose of aiding the contestant or respondent in the case. Surrogate Calvin, in rendering a decision in a will contest said:

"In all cases where expert testimony is required the expert should be employed and paid by the court and be regarded a court officer."

A judge of the Supreme Court of the United States declared in a leading case that "Experience has shown that opposite opinions of persons professing to be experts may be obtained to any extent: and it often occurs that not only days but even weeks are consumed in examinations to test the skill or knowledge of such witnesses and the correctness of their opinions, wasting time and wearing the patience of both the court and jury, and perplexing instead of elucidating the questions involved in the issue."

"Believe no experts," says the cynic bar,
They—how unjust—all alike deride.
This swears white black; but straightaway haud impar,
An equal sage approves the candid side."

So long ago as 1874, Professor John Ordonaux declared: "There is a growing tendency to look with distrust upon every form of skilled testi-

mony. Fatal exhibitions of scientific inaccuracy and self-contradiction cannot but weaken public confidence in the value of all such evidence. Some remedy is called for both in the interest of humanity and justice."

Fifty-five years have elapsed and California has the only comprehensive statute (Chapter nine).

Dr. Walton, a celebrated surgeon, writing in a Boston medical journal, said:

"I think one of the dangers in giving expert testimony is the tendency for the expert to feel that he carries the whole case on his own shoulders, and must decide questions that ought to be left to the jury. . . Finally, the scientific witness should come into court with clean hands and a pure heart, with sincerity of purpose, with a tendency and desire to ascertain and recognize truth whenever it may be found; to conceal nothing, mindful of his oath, which required him to speak not only the truth, but the whole truth."

In a celebrated case in New York City, the expert testimony required six days for its introduction. Eminent surgeons were called and learned counsel examined them. When the judge charged the jury he told them to disregard all of the expert testimony, as the same was too contradictory!

In a recent report of a committee of lawyers providing for the betterment of expert testimony,

there was a recommendation for the enactment of a law providing that an expert witness shall file with the clerk of the court a written report of his findings and opinions not less than three days prior to the trial; to make expert testimony as nearly non-partisan as possible. The report suggests the appointment of trained experts, especially in criminal cases.

There is, undoubtedly, a growing sentiment in nearly every state in the Union providing for the court expert.

It has been frequently observed in these pages that we should not condemn all experts. We should not bear in mind the lamentable misconduct of a few biased experts. We cannot hope for all reform in our statute. There will be other stages of progress.

Charles W. Eliot, former president of Harvard University, in discussing the popular dissatisfaction with the administration of justice in the United States, claims that the employment by the court of official experts is the most promising of all legislation proposed. Here is the view of a great scholar on this phase of law reform.

Of course, one difficulty that we have in the passage of any measure is the different interpretation of the courts on account of the different wording of the laws. In this instance, the Committee on Uniform Laws of the American Bar

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Association is doing such splendid work to harmonize our forty-eight divergent state laws. This will help us in the trial of cases, and, especially, that which characterizes the despatch of trials in the procedure of the British courts of justice.

As stated, it has been suggested that the medical experts prepare written reports and file them with the court. This would, undoubtedly, be unconstitutional, because of the provisions of the sixth amendment to the Constitution that accused in all criminal cases has a right to be confronted with witnesses against him.

Edmund Burke was right in saying that you cannot indict a whole nation. The same thing refers to the medical profession. Because a court might appoint a disqualified expert, it does not follow that the entire profession should be stigmatized.

Massachusetts Society of the Boston Bar Association, in 1908 suggested the passage of a measure providing for medical societies to name physicians of good professional standing to serve "as expert witness designated in the specialty in which they are deemed to be experts." The measure provided that the lists were to be posted in the clerks' offices of the several courts. It did not become law.

Michigan had a statute relating to the appointment of experts, but in the case of People vs. Dickerson, 164 Michigan, page 148, the

court held that the selection of expert witnesses by the court was beyond the judicial power of the court. Commenting upon this decision, Professor Wigmore says: "It is a pity that the court suffered such a severe attack of dikastophobia on the sight of this harmless statute. As the history and authorities on the present subject are ignored in the opinion, and as its fantastic logic would hardly be followed elsewhere, no further notice of its contents is needed."

Progress is reported from a group representing the Bar Association of the Medical Society of Minneapolis, Minnesota.

In Pennsylvania the Law Association prepared a recommendation providing for the selection of experts from a panel chosen by the state or county medical societies, where the question of the propriety of the release of anyone illegally placed in an institution for the insane appears, in which sanity or insanity is the issue: "No one shall be qualified to testify as an expert who has not had a special training and experience to be prescribed by statute, and the court should in all such cases limit the number of expert medical witnesses to be called on either side." The recommendation of the association also provides for abolishment by statute of the hypothetical question. These suggestions were unanimously adopted at a meeting of the association.

In Wisconsin there is a statute providing for

the appointment by the court of experts in criminal cases. The act provides that the compensation shall be fixed by the court and paid by the county upon the order of the court as a part of the costs of the action. Among other matters, the act provides: "The fact that such expert witnesses have been appointed by the court shall be made known to the jury, but they shall be subject to cross-examination by both parties, who may also summon other witnesses at the trial; that the court may impose reasonable limitations upon the number of witnesses who may give opinion evidence on the same subject."

Minnesota has been considering this question for a long time, but no action has been taken. The only section the state has is that relating to the allowance of fees as compensation to an expert. The matter has been taken up by the American Bar Association by its committee on Jurisprudence and Law Reform, of which Mr. Paul Howland, Cleveland, is the chairman. Mr. Howland prepared two statutes for the regulation of expert testimony and they passed both houses of the Ohio state legislature last year but were vetoed by the governor.

It is greatly regretted that the states of Illinois and Massachusetts have no adequate remedy. In Illinois, the matter is being reviewed by the State Bar Association.

In a report of the Committee of Jurisprudence and Law Reform of the American Bar Association, rendered in 1927, we find a recommendation for an act providing that "The court may, at any time, on his motion, call disinterested experts." The proposed measure also provides for the court to fix compensation, etc. Hon. H. W. Taft, one of the most eminent lawyers in America, was on this committee, also Roscoe Pound, dean of the Harvard Law School.

Prominent members of the American Medical Association have devoted much study and investigation to this subject. The resolution adopted by the house of delegates at the meeting in 1926 is so comprehensive that it is deemed advisable to quote it in full:

WHEREAS, The present court procedure in expert evidence in both civil and criminal cases has in many instances brought public criticism and disgrace on both the legal and the medical professions; and

WHEREAS, The present procedure in many cases is believed to defeat the administration of justice; and

WHEREAS, An effort is being made in many states by the bar associations and medical societies of those states to correct such maladministration of justice, and to relieve the legal and medical professions of the public criticism now received; and

WHEREAS, The American Bar Association is actively pursuing the above laudable effort; therefore, be it

RESOLVED, By the house of delegates of the Amer-

ican Medical Association that it recognizes the urgent need for such remedial legislation and such change in court procedure as will correct the abuse of expert opinion evidence; approves the efforts of the various bar and medical associations; and further be it

RESOLVED, That the house of delegates indorses the principle that in civic and criminal cases the court may appoint expert medical witnesses, who shall be paid out of public funds, and who may furnish a written report; and that the American Medical Association offers its cooperation by such means as lie in its power to promote such legislation as will be mutually satisfactory to the medical and legal professions toward the correction of the present unsatisfactory procedure of presenting expert opinion evidence, and the board of trustees is hereby requested to use the facilities of this organization in such a way as to give effect to the sentiment expressed in this resolution.

And, further, that the house of delegates indorses certain principles approved by the Committee on Jurisprudence and Legal Reform of the American Bar Association, and by the American Institute of Criminal Law and Criminology as follows:

That in civil and criminal cases where the issue of insanity is raised, expert medical witnesses may be appointed by the court, and paid from public funds, and that such witnesses may present a written report. Be it further

RESOLVED, That a copy of this resolution be sent to the American Bar Association.

IX

California Law Relating To the Appointment of Experts

October 15, 1909, Dr. Andrew Stewart Lobingier, a noted surgeon of Los Angeles, addressed the Los Angeles Bar Association at a banquet given in honor of the chief justice of the supreme court of the state of California. The doctor pointed out that our system relating to expert evidence was archaic, expensive and obtrusive of the ends of justice.

In 1911 the first measure drafted by Judge Frank Oster, Dr. Lobingier and the writer, was presented for passage. It was rejected by the legislature. A new bill was again brought to the attention of the California legislature in 1913. It passed the senate and failed in the assembly. The same act was presented in 1915. It passed the legislature and was vetoed by the governor. In 1921 another effort was made, resulting in passage of the measure by the legislature and a veto by the governor. In 1925 the measure finally became a law, due largely to the letters favoring its passage written by learned judges and distinguished members of the bar; also the persistent efforts of Senator Herbert Jones. It is known as Section 1871 of the Code of Civil Procedure of the state of California and reads as follows:

Section 1871. (New) Experts: Appointment of by court or judge: Compensation; manner of examination as witnesses. Whenever it shall be made to appear to any court or judge thereof, either before or during the trial of any action or proceeding, civil or criminal, pending before such court, that expert evidence is, or will be required by the court or any party to such action or proceeding, such court or judge may, on motion of any party, or on motion of such court or judge, appoint one or more experts to investigate and testify at the trial of such action or proceeding relative to the matter or matters as to which such expert evidence is, or will be required, and such court or judge may fix the compensation of such expert or experts for such services, if any, as such expert or experts may have rendered, in addition to his or their services as a witness or witnesses, at such amount or amounts as to the court or judge may seem reasonable. In all criminal actions and proceedings such compensation so fixed shall be a charge against the county in which such action or proceeding is pending and shall be paid out of the treasury of such county on order of the court or judge. In all civil actions and proceedings such compensation shall, in the first instance, be apportioned and charged to the several parties in such proportion as the court or judge may determine and may thereafter be taxed and allowed in like manner as other costs. Nothing contained in this section shall be deemed or construed so as to prevent any party to any action or proceeding from producing other expert evidence as to such matter or matters, but where other expert witnesses are called by a party to an action or proceeding they shall be entitled to the ordinary witness fees only and such witness fees shall be taxed and allowed in like manner as other witness fees. Any expert so appointed by the court may be called and examined as a witness by any party to such action or proceeding or by the court itself; but, when called, shall be subject to examination and ob-

jection as to his competency and qualifications as an expert witness and as to his bias. Such expert though called and examined by the court, may be cross-examined by the several parties to an action or proceeding in such order as the court may direct. When such witness is called and examined by the court, the several parties shall have the same right to object to the questions asked and the evidence adduced as though such witness were called and examined by an adverse party. The court or judge may, at any time, before the trial or during the trial, limit the number of expert witnesses to be called by any party.

When Governor Richardson signed Senate Bill 124 (which is now Section 1871 of the Code of Civil Procedure), providing for the court appointing experts, he said: "*This is one of the finest pieces of legislation adopted at the last session of the legislature.* Expert witnesses have become generally discredited, but this section will make it possible for an expert witness to give fair and impartial testimony, as his salary will be paid by the public and not by private individuals. This important measure is indorsed by judges of the higher courts and university presidents and is considered a great step in obtaining fair and impartial testimony from expert witnesses."

Judge Charles Monroe, after presiding as a trial judge for twenty years in Los Angeles county, said the bill was "a wonderful step in the right direction."

Examination of this bill shows it has many advantages.

First: It covers all proceedings, civil and criminal.

Second: It provides that the judge may, on the motion of either of the parties, or, if he desires, he may take the initiative himself, appoint one or more experts to investigate and testify.

Third: The court may fix the compensation—because it will differ as to the time employed, the matter involved, the extent of the examination, the character of the expert, and the expenses incurred by him in making his report.

Fourth: In criminal cases the charge is properly against the county. For instance, courts and juries are imposed on frequently by the plea of temporary insanity. An alienist employed by the state would give an unbiased report, regardless of its effect.

Fifth: In civil cases the compensation shall be taxed as costs in the case. The defeated party would have to pay in the end.

Sixth: Nothing in the act prevents any party to action calling other experts. If he is dissatisfied with the court's expert he is not precluded by their testimony.

Seventh: The act provides that the experts called by the court may be examined and cross-examined by the several parties. The rights of the litigants are thus safeguarded. If any prejudice exists in the mind of the court's expert it can be brought out. Again, even though they are

called by the court, nevertheless, the parties have the right to interpose the usual objections to questions asked.

Eighth: When the bill was first submitted to the judges of the Superior Court of Los Angeles County an amendment was offered providing that "The court may, in its discretion, advise the jury, if there be one, that such expert or experts had been appointed by the court." We have eliminated this phase because Article VI, Section 19, of the constitution of the state of California, provides: "Judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law." Of course, this provision of the constitution is "mandatory and prohibitory." (Article I, Section 22). As Judge Oster says: "The Supreme Court of California has repeatedly held that the trial court shall not call attention to one witness or class of witnesses to the prejudice of others. As a matter of fact, counsel on either side can bring to the attention of the jury the fact that the expert was appointed by the court.

Another feature which is so essential to have incorporated in our statutes, is that portion of the act which provides that the court may limit the number of experts to be called by any party. The unnecessary number of experts called in homicide cases, and in actions relating to the condemnation of land, has seriously affected the

transaction of the business of our courts and hardly a judge on the bench today does not go out of his way to denounce the present latitude permitted in these matters.

Tenth. The act, taken as a whole, is fair to all. There is no joker in it.

Before presenting our measure to the state legislature, the writer submitted the same to Dr. Hamilton. We quote from his letter: "The draft of a bill for the regulation of expert testimony you send is quite in the line with what I have, for years, recommended. We have tried to put such a measure through in New York, but have failed through politics. There always seems to be a hitch when it comes to compensation, and the influence of dishonest men is very great. The measure you suggest, or some other like it, is the only way to correct a glaring evil. So long as experts can be 'hired' so long will rank dishonesty flourish."

Dr. Lobingier contends that the following benefits will accrue:

1. It will greatly reduce the number of experts called in a case and thus have a distinct economic value.

2. It will facilitate and expedite the trial of a case when the court calls its own expert.

3. It will dignify expert evidence, for the court's expert is an officer of the court and free from prejudice for or against plaintiff or defendant.

4. It does not invade the right or privilege of plaintiff and defendant calling their own experts.

5. It secures the expert of the court at a reasonable and just compensation, shared by the litigants and the state.

Dr. Lobingier's point number one is in accord with the remarks of Federal Judge Severens, who, (in the case of American Stove Co., vs. Cleveland Foundry Co., 158 Fed. 938) deplores the calling of so many experts and says:

"Usually, the testimony of one expert witness on each side is enough to insure a full and fair elucidation of what is recondite in the case. 'The voice of a single teacher is more than a confusion of many tongues.' "

Referring to this measure Henry W. Taft says: "If it is found to be constitutional it will blaze the way for improvement along the line proposed."

We believe that this law will do much to remove the disgrace attached to experts. We do not want the name of an expert to be anathema to the public, especially when, in celebrated cases, popular hysteria is to be noted. Fortunately, there is no formidable barrier to the open-minded discussion of this subject. In the present system, many litigants are irretrievably defrauded of their rights.

When the statute came before the court in the case of People vs. Cornell, Cal. 75, Calif. De-

cisions 132, the court merely held that the defendant is not prejudiced by the appointment in open court, in the presence of the jury, of an expert alienist for the purpose of testing his sanity, nor by laudatory comments of the trial judge touching the qualities of the proposed appointee, and in the case of People vs. Spraic, Vol. 54, Calif. Appellate Decisions 1376, there was some delay in the court in the appointing of experts to examine the defendant's sanity. The court appointed experts a few days before the trial and both testified. The court held that there was nothing in the record to show that the defendant suffered any prejudice by reason of the delay in making these appointments. The section has been used in the Superior Court of Sacramento county in cases where the authenticity of certain handwriting was involved.

This proceeding, being in the estate of Harry Hastings, decided February 1, 1929, by the Supreme Court of California, it was contended that this section was unconstitutional. The court, however, approved the action of the trial court in appointing an expert, and again, the attack on the section was unsuccessful.

Judge Robinson, prominent trial judge of Oakland, has used the section in a contested will case and in personal injury cases. In all cases he made it known to the jury that the witness

was called at the instance of the court and not by either litigant. He says:

"I am very much in favor of the privilege granted the court under the section. Sometimes it is apparent that expert witnesses called and paid by either party unconsciously lean, especially on cross-examination, toward the side of the party employing them. In fact, a very prominent physician, often called as an expert witness in the department over which I have presided for some years, stated to me that unconsciously, on cross-examination, he was afraid he became somewhat partisan in the effort to sustain his testimony given on direct examination. He was perfectly honest and sincere, but felt that he could not help the leaning."

Presiding judge of the Superior Court of Orange county, Hon. H. G. Ames, says he is "heartily in accord with the provisions of the section." He bases this on his experience as practitioner and as judge. In appointing an expert in a well-known case, he said: "It was with a sense of satisfaction to myself that I was able to select an expert of the highest standing in his profession and whom I knew to be wholly unbiased in the proceeding."

Among other jurists who have found the law helpful are Hon. Frank Collier, of Los Angeles, and Hon. Walter Perry Johnson, of San Francisco. The former says: "I have employed ex-

perts, both of the medical profession and in other professions, where a question of doubt existed in my mind. In each instance very satisfactory results have been achieved. Generally speaking, I have used the section time and again with results very satisfactory to me. I believe I came nearer to the truth than I would had I not employed my own experts."

In two criminal cases in Kern county the section was availed of where insanity was interposed as a defense. In one case, the defendant was charged with murder, and the other with robbery.

George H. Johnson, district attorney of San Bernardino county, is in favor of the section and from his long experience says: "I personally feel that the section is a valuable one and want to assure you of my hope that it has been found so in other counties."

In preparing a report the California Crime Commission will submit a list of experts by the medical associations. This will give the judge a reliable list from which to make his choice.

We come back to the dictum in Timothy I, Chapter I, verse 8, "The law is good if a man use it lawfully."

Appendix I

Another section was added to the Penal Code (numbered 1027) at the 1929 session of the California legislature, providing that "When a defendant pleads not guilty by reason of insanity the court must select and appoint two alienists, at least one of whom must be from the medical staffs of the state hospitals, and may select and appoint three alienists, at least one of whom must be selected from such staffs, to examine the defendant and investigate his sanity. It is the duty of the alienists so selected and appointed to examine the defendant and investigate his sanity, and to testify, whenever summoned, in any proceeding in which the sanity of the defendant is in question. Said alienists so appointed by the court shall be allowed such fees as in the discretion of the court seem just and reasonable, having regard to the services rendered by the witnesses. The fees allowed shall be paid by the county where the indictment was found—or in which the defendant was held for trial.

"Nothing contained in this section shall be deemed or construed to prevent any party to any criminal action from producing any other expert evidence as to the sanity of the defendant; where expert witnesses are called by the district attorney in such action, they shall only be entitled to

such witness fees as may be allowed by the court.

"Any alienist so appointed by the court may be called by either party to the action or by the court itself and when so called shall be subject to qualification as an expert. When called by the court, or by either party, to the action, the court may examine the alienist, as deemed necessary, but either party shall have the same right to object to the questions asked by the court and the evidence adduced as though the alienist were a witness for the adverse party. When the alienist is called and examined by the court the parties may cross-examine him in the order directed by the court. When called by either party to the action the adverse party may examine him the same as in the case of any other witness called by such party."

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